(2)

Supreme Court, U.S.
FILED
OCT 18 2004
OFFICE OF THE CLERK

No. 04-218

IN THE

# Supreme Court of the United States

ERIC RODRIGUEZ, et. al.,
*Appellants*,
v.
GEORGE E. PATAKI,
*Appellee*.

**On Appeal from the United States District Court for the Southern District of New York**

## BRIEF FOR KISHA THOMAS, CLIFTON BELOW, BASSEL CHARLES KORKOR, PATRICIA RAYCHER KREITZER, AND JOHN PATRICK TRACY AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

JEFFREY M. WICE
P.O. Box 42442
Washington, D.C. 20015
(202) 494-7991

RONALD A. KLAIN
JONATHAN D. HACKER
(*Counsel of Record*)
CHARLES E. BORDEN
DAVID P. BERGER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

*Attorneys for Amici Curiae*

## TABLE OF CONTENTS


Page

TABLE OF AUTHORITIES ..... ii

INTEREST OF *AMICI CURIAE* ..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 5

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW REFLECTS TWO GROWING CONFLICTS AMONG STATE AND FEDERAL COURTS REGARDING THE PERMISSIBILITY OF POPULATION DEVIATIONS IN THE STATE LEGISLATIVE DISTRICTING. ..... 5

A. There Is A Clear Conflict Over The Permissibility Of *De Minimis* Population Deviations In State Legislative Maps. ..... 6

B. There Is A Clear Conflict Over The Meaning of The "Ten Percent Rule" ..... 8

II. THE COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW IS WRONG ON THE MERITS ..... 12

CONCLUSION ..... 16

## TABLE OF AUTHORITIES

**Page(s)**

### CASES

*Abate v. Mundt*,
403 U.S. 182 (1971) ..... 15

*Black Political Task Force v. Connolly*,
679 F. Supp. 109 (D. Mass. 1988) ..... 3, 9

*Brown v. Thomson*,
462 U.S. 835 (1983) ..... 6

*Colleton County Council v. McConnell*,
201 F. Supp. 2d 618 (D.S.C. 2002) ..... 3, 9

*Cox v. Larios*,
124 S. Ct. 2806 (2004) ..... 2, 7

*Daly v. Hunt*,
93 F.3d 1212 (4th Cir. 1996) ..... 3,11

*El-Amin v. State Bd. of Elec.*,
717 F. Supp. 1138 (E.D. Va. 1989) ..... 16

*Frank v. Forest County*,
336 F.3d 570 (7th Cir. 2003) ..... 3, 8, 12

*Gaffney v. Cummings*,
412 U.S. 735 (1973) ..... 6,14

*Gorin v. Karpan*,
775 F. Supp. 1430 (D. Wyo. 1991) ..... 3

*Hulme v. Madison County*,
188 F. Supp. 2d 1041 (S.D. Ill. 2001) ..... 3,11

*In re Constitutionality of House Joint Resolution 1987*,
817 So. 2d 819 (Fla. 2002) ..... 3, 9

*Karcher v. Daggett*,
462 U.S. 725 (1983) ..... 7

*Kirkpatrick v. Preisler*,
394 U.S. 526 (1969) ..... 15

*Larios v. Cox*,
300 F. Supp. 2d 1320 (N.D. Ga. 2004) ..... *passim*

## TABLE OF AUTHORITIES
**(continued)**

**Page(s)**

*Legislative Redistricting Cases*,
331 Md. 574 (1993) ..... 3, 9

*Marylanders for Fair Representation v. Schaefer*,
849 F. Supp. 1022 (D. Md. 1994) ..... 3, 10, 13

*Montiel v. Davis*,
215 F. Supp. 2d 1279 (S.D. Ala. 2002) ..... 3,10

*Mountain States Legal Foundation v. Denver School Dist. #1*,
459 F. Supp. 357 (D. Colo. 1978) ..... 16

*Reynolds v. Sims*,
377 U.S. 533 (1964) ..... 2, 6,15

*Rodriguez v. Pataki*,
308 F. Supp. 2d 346 (S.D.N.Y. 2004) ..... *passim*

*Roman v. Sincock*,
377 U.S. 695 (1964) ..... 11

*Shaw v. Reno*,
509 U.S. 630 (1993) ..... 5,14

*Story v. Anderson*,
611 P.2d 764 (Wash. 1980) ..... 7

*Wright v. City of Albany*,
306 F. Supp. 2d 1228 (M.D. Ga. 2003) ..... 3, 9

## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* are residents of several states possessing state legislative maps with total maximum population deviations that are near or exceed ten percent. Kisha Thomas is a resident of Baton Rouge, Louisiana. The Louisiana State Senate and House of Representatives both have overall population deviations exceeding 9.9%. Clifton Below is a resident of Lebanon, New Hampshire. Redistricting legislation enacted this year by the State of New Hampshire increases the overall population deviation of their State Senate from 5.46% to 9.48% and of their House of Representatives from 9.26% to 14.8%. Bassel Charles Korkor is a resident of Columbus, Ohio. The Ohio State Senate has an overall population deviation of 8.1% and the House of Representatives has an overall population deviation of 12.46%. Patricia Raycher Kreitzer is a resident of Rutland, Vermont, and John Patrick Tracy is a resident of Burlington, Vermont. The Vermont State Senate has an overall population deviation of 14.28% and the House of Representatives has an overall population deviation of 18.99%.

*Amici curiae* are concerned that, as a result of the growing confusion over the proper standard for adjudicating population deviations in state legislative maps, there is a substantial risk that their right to vote will be impermissibly diluted during the next redistricting cycle. *Amici curiae* fear that, in the absence of explicit guidance from this Court, substantial uncertainty will exist among both legislatures and courts during subsequent redistricting cycles regarding whether and under what circumstances population deviations are permissible in state and local legislative redistricting. *Amici curiae* therefore urge this Court to note probable jurisdiction in this

---

[1] Letters of consent from all parties have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. The State Legislative Policy Institute made a financial contribution to this brief authored this brief in whole or in part.

case to prevent confusion by states and to provide the proper standard for state and local legislative redistricting.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal arises out of a challenge by several New York residents to the constitutionality of the New York State Senate map. The State Senate map contains a maximum population deviation of 9.78%, and plaintiffs contend that these deviations – resulting in the relative overpopulation of certain State Senate districts and the relative underpopulation of others – violate the Equal Protection Clause under "one person, one vote" principles. The three-judge court upheld that map despite such deviations, holding that, under this Court's "one person, one vote" precedents governing *state legislative districts* (as opposed to congressional districts), a districting plan with a maximum population deviation of less than 10% is entitled to a strong presumption of constitutionality, subject to invalidation only where the deviations are justified solely by illegitimate reasons.

That holding implicates a direct and irreconcilable conflict in the courts over the legal standard applicable to "one person, one vote" challenges to state legislative redistricting plans.

During the more than forty years that have passed since the adoption of the "one person, one vote" requirement for state legislative districts in *Reynolds v. Sims*, 377 U.S. 533, 558 (1964), this Court has repeatedly affirmed the basic principle that state legislative maps may contain *de minimis* variations in district populations. The courts have sharply divided, however, over how to evaluate plans that contain such variations. At one extreme is the recent decision by the three-judge panel in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), summarily affirmed by this Court less than four months ago, *Cox v. Larios*, 124 S. Ct. 2806 (U.S. 2004). *Larios* holds that *every* deviation from absolute population equality, no matter how miniscule, must be justified by a

specific, legitimate state interest. At the other extreme are numerous decisions holding that *de minimis* population deviations are *per se* lawful, so long as they do not exceed 10%. *See, e.g., Frank v. Forest County*, 336 F.3d 570, 573 (7th Cir. 2003); *Wright v. City of Albany*, 306 F. Supp. 2d 1228, 1231 n.5 (M.D. Ga. 2003); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 631 (D.S.C. 2002); *Gorin v. Karpan*, 775 F. Supp. 1430, 1437 (D. Wyo. 1991); *Black Political Task Force v. Connolly*, 679 F. Supp. 109, 123 (D. Mass. 1988); *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 827 (Fla. 2002); *Legislative Redistricting Cases*, 331 Md. 574, 595 (1993).

Between these poles are decisions – including the decision below – holding that deviations of less than 10% are entitled only to a presumption of constitutionality, but these decisions divide further over the nature of the presumption. Some opinions join the decision below in applying a "strong" presumption, holding that state legislative districting plans with deviations less than 10% may be invalidated only if the plaintiffs prove that the deviations were based entirely on illegitimate considerations. *See Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1032 (D. Md. 1994); *Montiel v. Davis*, 215 F. Supp. 2d 1279, 1286 (S.D. Ala. 2002). Other decisions apply a "weak" presumption, holding that a districting plan with deviations of less than 10% may be invalidated even if some legitimate motives were involved, so long as illegitimate considerations were sufficiently prevalent to have tainted the process. *See Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996); *Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1047 (S.D. Ill. 2001).

The conflict and uncertainty over a matter of such fundamental legal, political and social significance cannot be tolerated. A state legislature facing the task of redistricting – arguably the most important task of self-government – now can have little if any idea exactly what will be expected of it in terms of deviations from absolute mathematical equality.

Is any deviation up to 10%, for any reason, *per se* permissible? Must each deviation be justified? What justifications are legitimate? Are "mixed motives" lawful? As the division among the courts makes clear, these and many other questions have no ready answers under existing precedents. No just end of government is served when state legislatures are guided in their districting decisions by the light of such dim beacons.

Although it is perhaps counter-intuitive, the fact that most of the redistricting litigation that arose after the 2000 census has come to a close only underscores the urgent need for plenary review in this case. This proceeding likely represents the last chance this Court will have before the 2010 districting round to provide guidance on the appropriate standards for adjudicating "one person, one vote" claims in the state legislative context. If the Court does not hear this case on its merits, state legislatures will almost certainly endure another round of redistricting confusion, spawning widespread one-person, one-vote litigation, which will be subject to disparate judicial standards, leading to disuniformity and unfairness with respect to the most fundamental of all rights – the right to vote. It is thus essential that this Court note probable jurisdiction in this case and clarify the proper standard for assessing population deviations in state legislative maps.

Finally, although we submit that *any* one standard is likely better than the current state of disarray, if the Court does not note probable jurisdiction it should reverse the decision below and reject the strong presumption of legality applied in this case. Under a standard requiring proof that deviations of less than 10% were *solely* the result of illegitimate considerations, a state legislature would be permitted to dilute certain citizens' votes for predominantly impermissible purposes, as long as it did not do so solely for impermissible purposes. Surely the equal right to vote is not so illusory. The Court should also make clear that, for purposes of a *one-person, one-vote claim* partisan considerations are *not* a le-

gitimate reason for diluting the votes of a subset of the citizenry. Partisan considerations may well be permissible in the context of a gerrymandering/appearance claim, but such claims are "analytically distinct" from vote dilution claims, *see Shaw v. Reno*, 509 U.S. 630, 652 (1993), and party affiliation should play no role at all in the weight a state legislature decides to assign to a given population's vote. Simply stated, there is no plausible justification for allowing the party in control of the machinery of government to use its power to invidiously discriminate against its political opponents by diluting their votes; indeed, such a concept runs counter to fundamental principles of democracy.

Accordingly, this Court should note probable jurisdiction, either to reverse the erroneous ruling below – or, if it is inclined to affirm, so as to provide clear direction as we approach the next round of redistricting.

## ARGUMENT

### I. THE COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW REFLECTS TWO GROWING CONFLICTS AMONG STATE AND FEDERAL COURTS REGARDING THE PERMISSIBILITY OF POPULATION DEVIATIONS IN STATE LEGISLATIVE DISTRICTING.

The decision of the three-judge panel below, in finding that the maximum population deviation of 9.78% in the New York State Senate district map was lawful, squarely implicated two current conflicts among state and federal courts which are in urgent need of resolution. *First*, in concluding that state legislative maps are not required to have absolute population equality, the court below took a position that was diametrically opposed to the one taken by the panel in *Larios*. *Compare Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 363-64 *with Larios*, 300 F. Supp. 2d at 1337-38. The decision below thus exacerbates already existing uncertainty over whether state legislative maps should be subject to a zero population deviation standard. *Second*, in interpreting the

"ten percent rule" as mandating that deviations of less than ten percent enjoy a strong presumption of constitutionality, the three-judge panel further deepened the conflicts among various federal and state courts over the proper meaning and application of the "ten percent rule."

This Court should note probable jurisdiction to resolve both of these issues.

### A. There Is A Clear Conflict Over The Permissibility Of *De Minimis* Population Deviations In State Legislative Maps.

The most basic conflict implicated by the decision below is whether state legislative districting plans are subject to a standard of absolute population equality or whether they may contain *de minimis* population deviations.

Starting with its earliest "one person, one vote" decision in *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court has indicated that although state legislative districts must adhere to general population equality, some *de minimis* population would likely be permissible. Indeed, this Court has suggested that pure mathematical equality, if required in the context of state legislatures, might come at the expense of effective representation. *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). In *Brown v. Thomson*, 462 U.S. 835 (1983), this Court identified a 10% deviation as a constitutional benchmark for evaluating vote-dilution challenges to state legislative districts. *Id.* at 842.

Most courts, including the three-judge panel below, have read this Court's precedents to hold that "if the maximum population deviation between districts in a redistricting plan is under ten percent, the state has no burden to justify that deviation." *Rodriguez*, 308 F. Supp. 2d at 364. Some courts have held that such a plan is altogether immune from challenge; others have held that, while the state has no burden to justify the deviation, a plaintiff nevertheless can prevail by proving that the deviation is not justifiable. We discuss that controversy below, *infra* at 8-12; what matters for present

purposes is that most courts accept the basic principle that state legislative districts may depart from absolute population equality in some *de minimis* measure of up to 10%.

That understanding stands in sharp contrast to the decision of the three-judge panel in *Larios*, 300 F. Supp. 2d at 1337-38, which was summarily affirmed by this Court in June, *Cox v. Larios*, 124 S. Ct. 2806 (U.S. 2004). The *Larios* court concluded that "deviations from exact population equality" in state legislative maps may only be allowed when they "further legitimate state interests such as making districts compact and contiguous, respecting political subdivisions, maintaining the cores of prior districts, and avoiding incumbent pairings." *Id.* at 1337. In adopting this standard, the three-judge panel in *Larios* essentially imported the standard for assessing population equality for Congressional maps – specifically the standard promulgated by this Court in *Karcher v. Daggett*, 462 U.S. 725 (1983) – into the state legislative context. *See Larios*, 300 F. Supp. 2d at 1338, 1352 (evaluating maps under *Karcher* standard). And because there is no such thing as a *de minimis* population deviation with respect to Congressional districting, *Karcher*, 462 U.S. at 734, the *Larios* court effectively adopted a population equality standard for state legislative districts that also does not permit such minor deviations.

Although a few courts prior to *Larios* had embraced a similar *de facto* zero population deviation standard for state legislative districts, *see, e.g., Story v. Anderson*, 611 P.2d 764, 767 (Wash. 1980) (only minor deviations acceptable and those must be in order to achieve "legitimate, rational state objectives"), most had interpreted *Reynolds*, *Gaffney*, and their progeny as allowing for *de minimis* variations in legislative district populations that do not need to be justified by the State. *See infra* at 8-11. By affirming *Larios*, this Court cast doubt on that long line of precedent and – more important – on the continued viability of the many state legislative maps with *de minimis* population deviations. In turn, the decision

in this case casts doubt on the continuing validity of *Larios*, even though that decision was summarily affirmed by this Court just last Term. This conflict cries out for resolution. The demanding standard of *Larios* – which forces states to justify every departure from absolute population equality, with little regard for any 10% deviation benchmark – is either the correct standard governing state legislative redistricting, or it is not. State legislators should know the answer before the next round of districting, for it is a distinction with direct and obvious consequences for the redistricting process: a map that gets drawn under a presumption (either whether conclusive or rebuttable) that a 10% deviation is permissible without further inquiry will look nothing like a map drawn under the presumption that *every* minor deviation must be specifically justified. At a minimum, then, the Court should grant plenary review to decide whether the *Larios* rule, or the 10% benchmark rule identified in this Court's precedents, should govern one-person, one-vote challenges to state legislative redistricting plans.

### B. There Is A Clear Conflict Over The Meaning Of The "Ten Percent Rule."

The decision below implicates a second, related conflict among the federal and state courts: assuming *de minimis* population deviations *are* justified, whether the 10% benchmark is an absolute safe harbor or a presumption of validity, and if it is the latter, how strong the presumption should be. The Court should note probable jurisdiction to resolve that important controversy as well.

1. Most lower courts view the 10% rule – incorrectly, we submit – as a "safe harbor." These courts treat legislative plans with a maximum population deviation of less than 10% as being altogether immune from any "one person, one vote" challenges. *See, e.g., Frank*, 336 F.3d at 573 (observing that *Brown* makes it clear that "ten percent rule" creates safe harbor); *Wright*, 306 F. Supp. 2d at 1231 n.5 ("The Supreme

Court has created a 'safe harbor' in regards to deviations. While the deviation is an important factor for the Court to consider, anything less than 10% is within the 'safe harbor.'"); *Colleton County Council*, 201 F. Supp. 2d at 631 ("Generally, a 'safe harbor' exists for legislatively implemented plans achieving less than a 10% deviation.").[2] If the challenge in this case had been brought before any of these courts, the mere fact that the New York map had a population deviation of less than 10% would have been sufficient to end the "one person, one vote" inquiry, and plaintiffs' claim would have been dismissed on the pleadings.[3]

2. The fact that the "one person, one vote" claim in this case could not be rejected until summary judgment demonstrates the difference between the safe harbor approach and the "strong presumption" rule applied by the court in this

---

[2] *See also Black Political Task Force*, 679 F. Supp. at 123 ("The new City of Boston electoral districts and the State Senate and Councillor Districts fall within the *de minimis* ten percent deviation rule that insulates state redistricting plans from effective challenge as violative of the 'one person, one vote' precept."); *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d at 827 ("Given that the statistical overall ranges for the House and Senate districts . . . each fall well under the 10% deviation that the Supreme Court and this Court have recognized as constitutionally valid, we find that the Legislature has achieved a mathematical preciseness in the districts that complies with the equal protection requirements of both the Florida and United States Constitutions."); *Legislative Redistricting Cases*, 331 Md. at 595 ("But the Supreme Court has unequivocally built a 10% degree of flexibility into the one person, one vote requirement so that states can accommodate important concerns in reapportioning their legislatures. The Governor's plan undeniably remains within that degree of flexibility, and is therefore valid under federal equal protection principles.").

[3] *Amici curiae* do not, of course, believe either that "safe harbor" approach represents the correct interpretation of the "ten percent rule" or that plaintiffs' suit should have been dismissed on a motion to dismiss. They make this point merely to illustrate that the interpretation of the "ten percent rule" that a court chooses can have substantial substantive consequences, and can result in some instances in the litigation in question being shortened or extended by months or even years.

case. *See Rodriguez*, 308 F. Supp. 2d at 364-65. The strong presumption rule embraces the position that legislative plans with deviations of less than 10% are presumptively constitutional, but that a plaintiff can rebut that presumption by offering additional extrinsic evidence demonstrating that the deviations were *wholly* the product of invidious discrimination. *See id.* at 365 ("Thus, if the plaintiff can present compelling evidence that the drafters of the plan ignored all the legitimate reasons for population disparities and created the deviations solely to benefit certain regions at the expense of others, a one-person, one-vote action will lie even with deviations below ten percent.") (quotation omitted). Other courts have also adopted this rule. *See Marylanders for Fair Representation*, 849 F. Supp. at 1032 ("To prevail, though, the plaintiffs have the burden of showing that the 'minor' deviation in the plan results solely from the promotion of an unconstitutional or irrational state policy. Thus, the plaintiff must demonstrate . . . that the asserted unconstitutional or irrational state policy is the actual reason for the deviation."); *Montiel*, 215 F. Supp. 2d at 1286 (following *Marylanders for Fair Representation*). Under this approach, plaintiffs challenging a state legislative map on the basis of a "one person, one vote" argument have a very high hurdle to clear – they can only prevail by showing that the deviations entirely resulted "from an impermissible or irrational purpose." *Rodriguez*, 308 F. Supp. 2d at 364. Although they set the bar high, the courts that embrace the "strong presumption" approach at least accept "the proposition that the 'ten percent rule' is not meant to protect a state that is systematically disadvantaging groups of voters with no permissible rational justification for the disproportion." *Id.* Those courts that have adopted the "safe harbor" approach, by contrast, make no such concession: so long as the plan reflects a maximum population deviation of less than 10%, any justification for the deviation – or no justification – is permissible.

3. Despite that important difference, however, both the "strong presumption" approach and "safe harbor" approach

are significantly deferential to a state legislature's decision to enact a map with *de minimis* population deviations. In fact, the court below noted that it was adopting a rigorous standard for challenging state legislative maps because "[i]f the burden on the plaintiffs in minor-deviation cases were anything less than this substantial showing, then the plaintiffs would be able to challenge any minimally deviant redistricting scheme." *Rodriguez*, 308 F. Supp. 2d at 365. That measure of deference is absent from the third approach some courts follow, which is essentially a "weak presumption" that plans within the 10% benchmark are valid. Under the "weak presumption" approach, a plaintiff can carry his burden of proof merely by demonstrating that "the apportionment process had a 'taint of arbitrariness or discrimination.'" *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)); *see also Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1047 (S.D. Ill. 2001) (following *Daly*). Thus, under the "weak presumption," plaintiffs challenging a state legislative map on "one person, one vote" grounds do not need to show that illegitimate considerations were the sole cause for the deviations; rather, demonstrating that such illegitimate considerations were sufficiently prevalent to "taint" the apportionment process is enough to rebut the presumption of constitutionality.

4. The standard set out in *Larios* is the least deferential of all. The three-judge panel in *Larios* held that even a deviation of less than 10% must be justified by a legitimate state interest, and a plaintiff can establish a plan's invalidity simply by demonstrating that its minor deviations were not *entirely* the product of legitimate state interests. *Larios*, 300 F. Supp. 2d at 1338 ("[W]here population deviations are not supported by such legitimate interests but, rather, are tainted by arbitrariness or discrimination, they cannot withstand constitutional scrutiny."). Put another way, the *Larios* approach is the flip-side of the "strong presumption" approach utilized in this case. The burden on the plaintiffs here was to show that *all* of the deviations in the state legislative map were the

product of illegitimate purpose; under the *Larios* standard, plaintiffs would only need to show that at least one of the deviations in the state legislative districting plan was the product of an illegitimate purpose to prevail.

* * * * *

As the Seventh Circuit observed in *Frank v. Forest County*, the purpose of the "ten percent rule" is to provide the lower courts with some degree of guidance in their efforts to adjudicate redistricting lawsuits, because "there is no theoretical guidance [on] how to balance the various considerations that political science might deem relevant to conforming districted governments to the principles of democracy." 336 F.3d at 572. Even before *Larios* the extent to which the "ten percent rule" was offering effective guidance to lower courts was questionable, and, in the wake of *Larios*, it is now even less likely that the rule will fulfill its essential purpose of minimizing judicial involvement in the redistricting process. *Id.* at 572-73. Accordingly, this Court should grant review to resolve the conflicts pervading this important area of the law and to clarify the meaning of the "ten percent rule."

## II. THE COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW IS WRONG ON THE MERITS.

In addition to granting review to resolve the confusion among lower courts over the appropriate standard for evaluating population deviations in state legislative maps, this Court should also note probable jurisdiction because the decision below was clearly wrong.

*First*, whatever may be the precisely correct formulation of the "ten percent rule," the "strong presumption" approach utilized by the three-judge panel in this proceeding is plainly wrong. Unlike the "safe harbor" approach, which essentially deems state legislative districts which deviate by less than 10% to be equally populated, the "strong presumption" approach concedes that deviations of under 10% can violate the

Equal Protection Clause.[4] The approach actually invalidates plans, however, only when the less-than-10% dilution is *solely* the result of illegitimate or impermissible policies. *See Rodriguez*, 308 F. Supp. 2d at 365; *Marylanders*, 849 F. Supp. at 1032. In other words, this approach still permits deviations in the state legislative map are largely, or even predominantly, the result of illegitimate policies. Under the reasoning of the court below, a state legislature could draw districts with deviations of nearly 10% for the express purpose of preserving the clout in the legislature of a particular geographic region so long as the legislature could also invoke some legitimate reason for deviations (*e.g.*, avoiding incumbent pairings) as "cover" for its conduct.[5] Such a result is illogical and indefensible: if *de minimis* mathematical deviations can dilute the right to vote at all, then such dilution, when motivated by an ill purpose, should not be rendered acceptable by the recitation of some additional, legitimate consideration said to have played a role in the districting decision. When improper factors predominantly motivated a decision to dilute votes, that decision (and the resulting district map) should be invalidated, even if the dilution reflects a population variance of less than 10%.

*Second*, the three-judge panel also manifestly erred in implying that political or partisan considerations can justify diluting citizens' voting rights. In assessing plaintiffs' claim that the deviations in the State Senate map were the product of an effort to overrepresent "upstate" voters at the expense of "downstate" voters, the court below noted that "[j]ust as in

---

[4] To be clear: *amici curiae* do not endorse the "safe harbor" approach – indeed, they believe, for a variety of reasons, that it is also an incorrect interpretation of the "ten percent rule." But because the "safe harbor" approach is not actually at issue in this litigation, we need not address it further.

[5] Legitimate state interests include "making districts compact and contiguous, respecting political subdivisions, maintaining the cores of prior districts, and avoiding incumbent pairings." *Larios*, 300 F. Supp. 2d at 1337.

the racial context where courts must deal with the overlap of racial identity and partisan identification and still conclude that the districting is racially – and not simply politically – drawn to find an equal protection violation," plaintiffs in the one-person, one-vote context must demonstrate that the districting "can be traced to impermissible considerations." *Rodriguez*, 308 F. Supp. 2d at 368. The court went on to observe that because "[i]n New York State, [there is a] traditional correlation between 'upstate' districts and Republican political identification," the plaintiffs "needed to proffer more than a mere assertion of a Senate conspiracy for 'upstate' ascendancy to meet their burden of showing a violation of the one-person, one-vote principle." *Id.* Thus, the three-judge panel essentially held that plaintiffs had failed to carry their burden of proof because they could not show that the deviations in the State Senate map were the result of regional, as opposed to political, discrimination. Implicit in that analysis is the conclusion that deviations drawn for the purpose of political advantage are constitutionally sound.

Although politically motivated redistricting has long been an accepted part of the decennial process, *see Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment... The reality is that districting inevitably has and is intended to have substantial political consequences."), the issue of whether politics can justify vote dilution is, as the *Larios* court recognized, a separate inquiry. *Larios*, 300 F. Supp. 2d at 1351 ("However, the Supreme Court's recognition of the politics inherent in districting arose in the context of political gerrymandering. Today, we have no occasion to consider the limits of partisan gerrymandering, but rather the very different set of considerations invoked by a claim that the one person, one vote principle has been violated."); *see Shaw*, 509 U.S. at 652 (vote-dilution claims are "analytically distinct" from racial gerrymandering claims). In the simple district-line-drawing/gerrymandering situation, where consideration of politics and even partisanship has been all but

conclusively sanctioned, the plaintiff's claim is not that her vote has been diluted, but that she has been denied her general Equal Protection (or First Amendment) right to participate in a governmental process free from the taint of impermissible motives. A vote-dilution claim is different, and simpler: it is that the citizen's vote is quite literally being counted for less than other citizens' votes. As the Court put it in *Reynolds*: "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." 377 U.S. at 568. So too is it impaired when its weight is diluted when compared to votes of citizens of other political parties. It is impossible to see why impermissible dilution caused by geographic differences can be made permissible by mere dint of the fact that the legislators were seeking to subordinate or disfavor the voter's political viewpoints. If anything, such dilution should be all the more impermissible. And indeed, this Court has indicated on several occasions that population deviations cannot be justified by interests in partisan dominance. *See Abate v. Mundt*, 403 U.S. 182, 187 (1971) ("We emphasize that our decision [to uphold a county-wide redistricting plan] is based . . . on the fact that the *plan before us does not contain a built-in bias tending to favor particular political interests* or geographic areas.") (emphasis added); *Kirkpatrick v. Preisler*, 394 U.S. 526, 534 (1969) ("But an argument that deviations from equality are justified in order to inhibit legislators from engaging in partisan gerrymandering is no more than a variant of the argument, already rejected, that considerations of practical politics can justify population disparities.").

Furthermore, to the extent that population deviations of less than ten percent require justification, it has long been established that such deviations must be justified by a *legitimate* state interest. *Reynolds*, 377 U.S. at 579 (noting that deviations should be based "on legitimate considerations incident to the effectuation of a rational state policy"). It is

abundantly clear that the electoral success of a particular political party is not a legitimate state interest in any circumstance. Indeed, there is little that is more inconsistent with basic democratic principles and concepts of the public interest than the notion of a partisan political machine using its control over the levers of government to perpetuate its power by diluting the voting rights of citizens with a different party affiliation. *See El-Amin v. State Bd. of Elec.*, 717 F. Supp. 1138, 1141 (E.D. Va. 1989) ("[F]ew prospects are so antithetical to the notion of rule by the people as that of a temporary majority entrenching itself by cleverly manipulating the system through which voters, in theory, can register their dissatisfaction by choosing new leadership.") (quotation omitted); *Mountain States Legal Foundation v. Denver School Dist.*, 459 F. Supp. 357, 360 (D. Colo. 1978) ("A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office.") (quotation omitted).

The three-judge panel's assumption that deviations of less than ten percent could be justified by political considerations was clearly wrong, which makes its rejection of plaintiffs' evidence of regional favoritism suspect at best. Given those errors, as well as the panel's improper application of the "ten percent rule," it is readily apparent that the grant of summary judgment by the court below was inappropriate. Probable jurisdiction should be noted, and the decision below should be reversed.

## CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted,

JEFFREY M. WICE
P.O. Box 42442
Washington, D.C. 20015
(202) 494-7991

RONALD A. KLAIN
JONATHAN D. HACKER
(*Counsel of Record*)
CHARLES E. BORDEN
DAVID P. BERGER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

*Attorneys for Amici Curiae*

Dated: October 18, 2004